# No. 9274

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

STAR POINTER EXPLORATION COMPANY,
*Appellant,*

vs.

UNITED STATES OF AMERICA, GREAT NORTHERN RAILWAY COMPANY (a corporation), and RAYMOND MACDONALD, as trustee of an express trust for others,
*Appellees.*

## OPENING BRIEF FOR APPELLANT, STAR POINTER EXPLORATION COMPANY.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## OUTLINE OF BRIEF OF APPELLANT IN SUPPORT OF RIGHT TO INTERVENE IN CASE WHERE TITLE TO MINERALS IN LAND OWNED BY APPELLANT IS CLAIMED BY BOTH GOVERNMENT AND RAILROAD, APPELLEES HEREIN.

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### PARTIES.

Appellee, the United States of America, plaintiff below, is hereinafter referred to as "plaintiff", and appellee Great Northern Railway Company, defendant below, is hereinafter referred to as either "defendant" or as the "Railroad". Appellant is referred to as "appellant" or as "applicant for intervention".

The position of appellee Raymond J. MacDonald, as trustee, etc., is explained fully in the appendix following page 50.

## JURISDICTIONAL STATEMENT.

This is a suit, brought by the United States against the Great Northern Railway Company to enjoin the railway company from taking minerals from beneath the surface of its right-of-way. (R. 2.) Appellant filed a petition for leave to intervene (R. 13), which was denied. (R. 26.) This appeal is from the order denying appellant's petition for leave to intervene.

The Court below had jurisdiction under Revised Statutes, Sections 563 and 629, as amended. (28 U. S. C. 41.) (R. 3, par. 2.) Appellant, a corporation of the State of Nevada, sought intervention of right under Rule 24 of the Federal Rules of Civil Procedure. The amount in controversy was in excess of $3000. The United States was a party, and as between defendant and appellee Great Northern Railway Company, appellee Raymond J. MacDonald, and appellant and intervener, a diversity of citizenship existed. However, the rule of jurisdiction in Federal Courts, depending on citizenship and amount or value of the subject matter, is generally held not to apply to interventions.

*Schweppe's Simkins Federal Practise,* ¶434, pages 370, 371.

This Court has jurisdiction under Section 128(a) of the Judicial Code. (28 U. S. C. 225.)

Appropriate notice of appeal was duly given, and filed in this Court in a timely manner. (R. 76.) By the order denying intervention, there has been a practical denial of certain relief to which the appellant is clearly entitled, since it cannot otherwise protect its right, being forbidden to sue the United States in a

direct action for the purpose of settling the one question raised both by the attempted intervention and by the main case.

*Palmer v. Bankers Trust Co.* (C. C. A. 8th), 12 Fed. (2d) 747, 752;

*Radford Iron Co. v. Appalachian Electric Power Co.* (C. C. A. 4th), 62 Fed. (2d) 940, cert. denied 289 U. S. 748, 77 L. Ed. 1494;

*U. S. v. Calif. Coop. Canneries,* 279 U. S. 553, 556, 73 L. Ed. 828, 841;

*U. S. Trust Co. v. Chicago Term. Tr. R. Co.* (C. C. A. 7th, 1911), 188 F. 292.

An order denying intervention is final and appealable if intervener is thereby prevented from obtaining relief.

*State of Wn. v. U. S.* (C. C. A. 9th), 87 Fed. (2d) 421.

Discretion to deny leave to intervene is a sound discretion, founded on the assumption that there are other available remedies open to the petitioner, and it is error to deny the right in a proper case where the intervener has no other recourse.

*Richfield Oil Co. v. Western Machinery Co.* (C. C. A. 9th, 1922), 279 Fed. 852.

Intervention may be a matter of right where petitioner, not being fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form.

*Whitaker v. Brictson Mfg. Co.* (C. C. A. 8th, 1930), 43 F. (2d) 485.

## STATEMENT OF THE CASE.

In its complaint the United States alleges that under the Act of March 3, 1875, granting a right-of-way through the public lands of the United States to the predecessor of the Great Northern Railway Company, that said company acquired neither the right to use any portion of said right-of-way for the purpose of drilling for and removing subsurface oil and minerals, nor any right, title or interest in or to the mineral deposits underlying the said right-of-way, but that such minerals remained the property of the United States and subject to its control and disposition, and that the defendant Railway Company claims and asserts ownership to the oils and minerals underlying its right-of-way and, unless restrained, will drill for and remove minerals underlying the surface of the right-of-way, depriving the United States of its property and the right thereto, to its irreparable injury. And, further, that the United States has the right to dispose of the mineral oil underlying said right-of-way under the Act of May 21, 1930. (46 Stat. 373.) The defendant Railway Company admits that unless it is restrained, it will drill for and remove the mineral oil underlying the surface of its right-of-way; denies that any part thereof is the property of the United States; and alleges that the minerals are its own property.

Appellant's claim hereinafter stated is adverse to plaintiff and adverse to defendant as to the minerals only, but relates to the subject thereof, to-wit: The title to minerals underlying a railroad right-of-way

granted under the Act of Congress of March 3, 1875, and similar acts.

Appellant is the owner in fee of certain sections of land in Granite County, Montana, by virtue of a series of patents from the United States to its predecessors in interest. All such sections are traversed by and are subject to the right-of-way of the Northern Pacific Railway Company. Said right-of-way was granted through the public lands by the United States to Northern Pacific Railway Company, under the Act of July 2, 1864, an Act, so far as here concerned, virtually identical in terms with the Act of March 3, 1875. The patents to appellant's predecessors reserved neither the right-of-way previously granted to the Railroad Company nor the minerals underlying the right-of-way, nor any minerals whatsoever; and as to minerals in lands so patented, appellant alleges that neither the plaintiff nor the defendant, appellees herein, have any right but that said rights belong entirely to the patentee and its successors in interest, represented as a class by appellant.

The plaintiff and defendant each claim title to the minerals underlying the right-of-way granted by the Act of March 3, 1875. Appellant avers that neither plaintiff nor defendant is or can be the owner of such underlying minerals because such minerals are owned by the patentees and grantees from the plaintiff of fractional subdivisions of land traversed by the railroad right-of-way, such ownership being subject, nevertheless, to the rights of the Railroad Company in the right-of-way strip as the same are conferred, and

for the purposes granted, under the Acts of Congress mentioned in the complaint and petition for leave to intervene.

Appellant sought to show by intervention that the United States extinguished its interest by the issue of patents and hence had no further interest. Intervention was sought under Rule 24 of the Federal Rules of Civil Procedure. This rule is hereinafter set out.

The title of the United States to the minerals underlying the right-of-way, if not extinguished by the grant to the Railroad under the Act of March 3, 1875, was extinguished by the subsequent act of the United States in patenting the land traversed by the right-of-way to the appellant's predecessors in interest, and the present right of possession to said minerals in appellant is superior to the rights asserted in the main suit by either plaintiff or defendant. If this is so, the United States, having no legal interest, cannot maintain a suit for an injunction and its complaint should be dismissed. Appellant believes that denial of intervention amounts to denial of relief to which it is entitled, in that, not being fairly represented below either by the plaintiff or defendant, its rights might be lost or substantially affected if intervention is not allowed.

In principle and in fact, title to minerals estimated to exceed in value the sum of $4,000,000 and belonging to appellant and underlying the right-of-way of the Northern Pacific Railway Company will be determined by the judicial construction of the Act of March 3,

1875, the same being the subject matter of consideration by the District Court.

Appellant, the successor in interest of such patentees and grantees of the plaintiff, alleged below that any attempted representation of its interest by plaintiff would be inadequate, and that in fact plaintiff's interest is adverse to appellant, and that no representation of appellant's interest would be made by plaintiff, nor would plaintiff present appellant's claim or legal rights to the consideration of the Court, either in whole or in part or at all, and that appellant would or may be bound by the judgment, to its irreparable injury.

Appellant alleges below that the question of law is whether, under the Railroad Land Grant Right-of-Way Act of March 3, 1875, and acts supplementary thereto and amendatory thereof, title to the minerals underlying rights-of-way so granted are vested in:

1. The United States, plaintiff herein, or
2. The Railway Company, defendant herein, or
3. The patentee of the subdivision traversed by the right-of-way.

Appellant, applicant for intervention below, contended that the question ought not to be determined by a consideration only of the asserted rights of plaintiff and defendant, that is, whether the title is vested in the United States or the Railway Company, but should be extended to that class of property owners in the situation of appellant; and appellant asserted

that such rights will not be stressed by either of the parties to the action, and that a full and complete judicial and equitable disposition of the pending case cannot be made without consideration of the rights of that class of ownership represented by appellant.

Appellant's interest in the litigation is substantial and its attempted intervention is made in good faith and in subordination to and in recognition of the main proceeding. Further, no remedy other than the intervention proposed is available for protection of intervener's rights to minerals underlying said railway right-of-way for the reason that the plaintiff claims said minerals, and appellant is without statutory authority to litigate or quiet its title against plaintiff in an independent suit brought for that purpose.

Appellant believes that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties to this action, and so asserted below.

In the interest of justice and equity and to secure a complete adjudication of the title to minerals underlying its grant under the Act of March 3, 1875, defendant, the Great Northern Railway Company, interposed no objection to appellant's petition in intervention in the Court below.

STATUTES AFFECTING THE ISSUES.

**Under wording of the Act of March 3, 1875, and related Federal Statutes and Land Office Regulations the right to mine or drill for oil by either the Government or the railroad on rights-of-way held in limited fee cannot be upheld under provision for disposal of lands crossed by right-of-way. (43 U. S. C. A. 937.)**

Intervention in State Practice in Montana.

Revised Codes of Montana, Section 9088, provide:

"Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. * * * (1921).

Such parts of the Act of March 3, 1875, as are pertinent here, are as follows, reference being made to Title 43 U. S. C. A. and the appropriate section numbers thereof.

934. Right of Way Through Public Lands Granted to Railroads. The right-of-way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said roadroad; also ground adjacent to such right-of-way for station buildings, depots, machine shops,

side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road. (March 3, 1875, c. 152, ¶1, 18 Stat. 482.)"

937. FILING PROFILE OF ROAD: FORFEITURE OF RIGHT. Any railroad company desiring to secure the benefits of sections 934 to 939, inclusive, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, *and thereafter all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way;** Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road. (March 3, 1875, c. 152, ¶4, 18 Stat. 483.)

The railroad company filed its profile of its road across Glacier County in 1891. At that time the rules and regulations of the Department of the Interior, promulgated January 13, 1888, were in effect. These rules and regulations concerned the Act of March 3, 1875, and prescribed the proceedings to be taken in order for a railroad to obtain a right-of-way thereunder. These rules and regulations state as follows, at page 428:

*Italics throughout the brief are supplied unless otherwise indicated.

"The Act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right-of-way' or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States."

"* * * All persons settling on public lands to which a railroad right-of-way has attached, take the same subject to such right-of-way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases."

Vol. XII, Decisions of the Department of Interior.

The Department of the Interior, as will be seen from the above-quoted part of its regulations, was of the opinion that the right-of-way was a right to *use* the 200-foot strip of land and not the entire corpus of the land embraced within the 200 feet of right-of-way, and that settlers on the public lands to which the right-of-way attached, took those lands subject to the right-of-way, and that they were required to pay for the full area of the subdivision entered, including the area within the right-of-way.

In 1894 the Secretary, in a letter to the Commissioner of the General Land Office, dated November 30th, held that the special Act of June 8, 1872 (17 Stat. 340), granted to the Pensacola and Louisville Railroad Company of Alabama only an easement to the company. The grant of right-of-way under that Act is in the same words as the grant in the Act of

1875 and other railroad grants. The Commissioner said (page 388):

> "The language of the Act of June 8, 1872, is: 'that the right-of-way through the public lands be, and the same is hereby, granted', etc. It is not the fee but the right to use the public lands for railroad purposes which was granted, and, in my opinion, an easement only was intended to pass to the railroad company."
>
> Vol. XIX, Decisions of the Department of Interior.

On January 6, 1904, the Commissioner of the General Land Office promulgated new regulations concerning the Act of 1875, which were approved February 11, 1904, by Secretary Hitchcock. These regulations stated (pages 482-483):

> "The Act of March 3, 1875, is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by law, a reversionary interest remaining in the United States, *to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the rights-of-way.* All persons settling on a tract of public land, to part of which right-of-way has attached, take the same subject to such right-of-way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases."
>
> Vol. XXXII, Decisions of the Department of Interior.

Taking the above statement of the Secretary by its four corners, it is apparent that he was of the opinion that the entire corpus of the land did not pass to the railroad company; that there was granted to the company the exclusive right of possession of the land, and the right to use it, for the purposes contemplated by the law, that is, for a railroad right-of-way, and that whatever reserved rights existed were conveyed by the Government to the person to whom the land over which the right-of-way passed was conveyed by such conveyance or patent and that when the surface was no longer used for the purpose for which it was granted, it, too, would revert to the patentee. This he no doubt deemed to be the meaning of the provision in the Act of 1875, that "all lands over which the right-of-way shall pass are to be disposed of subject to the right-of-way."

**The Right of Way Is Called an Easement by Congressional Act.**

Congress, in Section 940 of Title 43, U. S. C., relating to the forfeiture of rights where a railroad was not constructed within five years after location, refers to the right-of-way as an easement, and to its conveyance to the patentee of the Government. The section reads as follows:

> "940. Forfeiture of Rights Where Railroad Not Constructed in Five Years After Location. Each and every grant of right-of-way and station grounds made prior to February 25, 1909, to any railroad corporation under the six preceding sections, where such railroad had not been constructed and the period of five years next following the location of said road, or any sec-

> tion thereof, had on that date expired, is declared forfeited to the United States, to the extent of any portion of such located line then remaining unconstructed, and the United States resumes the full title to the lands covered thereby free and discharged from such *easement,* and the forfeiture declared shall, without need of further assurance or conveyance, *inure to the benefit of any owner or owners of land conveyed by the United States prior to such date subject to any such grant of right-of-way or station grounds;* Provided, that no right-of-way on which construction was progressing in good faith on February 25, 1909, shall be in any wise affected, validated, or invalidated, by the provisions of this section. (June 26, 1906, c. 3550, 34 Stat. 482; Feb. 25, 1909, c. 191, 35 Stat. 647.)"

The sense of this statute is in conformity with the idea of the Land Department in its regulations, quoted above, that the whole corpus of the land did not pass to the railroad company but that the railroad took what the statute calls an easement.

While the complaint asserts that the United States owns the oil, gas, and other minerals under the right-of-way, we respectfully call the attention of the Court to the fact that there is no allegation in the complaint that the United States has not disposed of the lands over which the right-of-way passes. The allegation is that they were public lands at the time the right-of-way was granted and that the defendant is now operating and maintaining a railroad on the right-of-way "over public lands" granted to defendant's predecessor.

FEE UNDERLYING EASEMENT PATENTED TO APPELLANT.

**Factual Basis For Intervention Rests in Government's Own Act Extinguishing Its Title and Granting Fee to Appellant "Subject" to Right-of-Way.**

The question presented by the complaint and the answer is whether, under the Railroad Right-of-Way Act of March 3, 1875, title to the minerals underlying rights-of-way granted by the Act are vested in:

1. The United States, plaintiff herein, or
2. The Railway Company, defendant herein.

Intervention is sought because appellant believes it would be irreparably injured by determination of the issue without a consideration of its ownership rights, as the successor to the patentees of the United States, to various legal subdivisions of land traversed by a railroad right-of-way granted under the Act of Congress of July 2, 1864, in terms virtually identical with the language of the Act of March 3, 1875. By consideration of such rights, the rights of all land owners similarly situated who derive their title to lands traversed by railroad rights-of-way by patent from the United States would be determined. Such patents to lands traversed by such rights-of-way almost uniformly grant the legal subdivision, without specific reservation of the right-of-way. The granting Act specifically provided that any railway company desiring to secure the benefits of the Act was required to file with the Register of the Land Office for the District in which the land was located, a profile of its road, and that "thereafter all such lands over which such right-of-way shall pass shall be disposed of sub-

ject to such right-of-way * * *'' Section 937, Title 43, U. S. C. A.

After the Government has disposed of any of the lands over which the right-of-way passes (and the public records disclose that it has), it is obvious that, under the provisions of this statute, it is a matter of grave doubt, if the minerals under the right-of-way did not pass to the railroad company, whether they belong to the Government, as contended, since the Government has disposed of the lands over which the right-of-way passes, subject only to the right-of-way.

The present case involves the question of ownership of the minerals underlying the railroad right-of-way as between the railway company and the United States, but this question is presented solely upon the theory that the United States had not disposed of the mineral rights underlying the right-of-way when it patented into private ownership the remainder of the legal subdivision crossed by the right-of-way. Trial of the case on this theory we believe would be so manifestly unfair to appellant as to be repugnant to equity, for the reason that appellant cannot sue the United States to determine the issue in a separate suit, and thereby the United States has the opportunity to obtain by injunction, what is the equivalent in legal effect of a declaratory judgment that it is the owner of the minerals underlying such railroad right-of-way without giving appellant, and the class of patentees represented by appellant, an opportunity to be heard. Such a judgment would constitute a precedent difficult to overcome and would render ap-

pellant liable to an accounting suit by the United States should it take the minerals it believes it owns from beneath the right-of-way, even though such taking was with the consent of the railroad and without any forbidden alienation, since the right-of-way would always remain available for railway use.

Since the prayer of the complaint is for restraint, is it not necessary for the trial Court to first determine whether the plaintiff has any right, even though the plaintiff be the United States? Can it do so without first hearing the patentee, whether he be the appellant or some other, since appellant's petition in intervention alleged affirmatively that the title of the United States to the minerals underlying the right-of-way was extinguished either by the grant to the railroad under the right-of-way granting Acts, or by the subsequent Act of the United States in patenting the land to private ownership? (R. 19, par. X.) If intervention is granted, the rights of the United States will not be protected at the expense of its grantees. The United States is claiming such minerals without any show of right, we believe, full well knowing and realizing that it has conveyed away such minerals, and that appellant, and those similarly situated, cannot later bring a suit against the Government to remedy what is believed to be an attempted taking of private property without a hearing. The United States, having opened up the question which even the railroad could not, the patentees, as a matter of justice and of right under the Rules of Civil Procedure, ought to be heard before the case is concluded.

**Intervention Indispensable to Preservation of Appellant's Fee.**

Intervention is indispensable to the preservation and enforcement of the claim of appellant, and appellant's interest in the minerals underlying the right-of-way can be established in no other way than by the determination and action of the lower Court, because, as has been said, independent suit by appellant against the United States cannot be maintained, and the United States has asserted ownership of minerals underlying the right-of-way on appellant's property. Thus the refusal to permit intervention is the denial to appellant of all relief, and such denial, not any longer being discretionary under Rule 24, may be appealed from. The United States has not granted the appellant a right to sue, either in the case appealed from, or in an independent action, but by the affirmative action of the United States in bringing the suit in Montana has given the appellant the opportunity to contest the claims of the Government which amount to complete seizures of appellant's mineral rights underlying the right-of-way. The denial of the right to intervene in such a case is appealable. (*Schmidt v. U. S.*, 102 F. (2d) 589; *State of Washington v. U. S.*, 87 F. (2d) 421.)

While the Court may consider the foregoing well taken, the Court will ask just what is the interest in this controversy of this intervener—that is—of appellant. This interest exists because the pleadings do not confine the issue to specific sections of right-of-way in Glacier County, Montana, but they present largely a question of law as to the rights of any of

the parties under any of the railroad or land grant right-of-way Acts as to any railway anywhere in the United States.

Were this not so, then the question might have to be presented in separate actions as to every legal subdivision of land traversed by any railroad right-of-way of any railroad in the nation.

The purpose of class suits by intervention proceedings is to prevent such a multiplicity of suits.

**This Is the First Case Requiring Circuit Court to Pass Directly on Rule 24, New Civil Procedure Rules.**

Apparently this is the first time that a Circuit Court has been asked to pass specifically on the meaning of Section 24 of the New Federal Rules of Civil Procedure.

Much of great import was said as to the construction of Rule 24 in connection with a discussion of Rules 13, 14, 18 and 20 in *Collins v. Metro-Goldwyn Pictures Corp.,* C. C. A., 2nd Circuit, 106 F. (2d) 83, 86, where the Court said:

> "The new rules provide for the presentation of numerous claims and the participation of multiple parties in a single civil action. Rules 13, 14, 18, 20 and 24 * * *"

Judge Clark concurring * * *

> "I desire, out of abundant caution, to stress a point perhaps made sufficiently clear in the opinion * * * that decisions as to the extent of a 'claim' or a 'cause of action' or a 'transaction' must necessarily be directed to the facts in issue

in a particular case and cannot be safely generalized into rigid rules applicable to other factual situations * * * The attempt to formulate and follow such rigid rules in the past has been generally unsuccessful, as well as prejudicial to the development of effective court procedure and at times unfair to litigants. One of the hopes for the new Federal Rules of Civil Procedure has been that these difficulties may be in large measure avoided or at least lessened. The variable character of 'cause of action' has been pointed out in Hurn v. Oursler, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 619. Because of its illusive character, that concept has been entirely omitted from the new Rules * * * These Rules make the extent of the claim involved depend not upon legal rights, but upon the facts, that is, upon a lay view of the past events which have given rise to the litigation. Such lay view of a transaction or occurrence, *the subject matter of a claim,* is not a precise concept; its outer limits should depend to a considerable extent upon the purpose for which the concept is being immediately used."

*Collins v. Metro-Goldwyn Pictures Corp.,* 2nd C. C. A., 106 F. (2d) 83, 86.

**The Subject Matter of the Action Is the Entire Right-of-Way from St. Paul to Tacoma.**

An examination of the complaint shows that the Government's claim is not restricted to a particular section of the right-of-way in Glacier County, Montana, but that Federal ownership of minerals is asserted in the entire right-of-way from St. Paul to Tacoma, Washington. The paragraphs of the com-

plaint that show this to be a fact are here set out at length:

> "That under the Act of March 3, 1875 (18 Stat. 482), the St. Paul, Minneapolis and Manitoba Railway Company, a railroad corporation, was granted a right-of-way through the public lands of the United States. That on the eleventh day of October, 1907, the St. Paul, Minneapolis and Manitoba Railway Company conveyed to the Great Northern Railway all its rights of property, including 'various lands granted to it by the United States of America and by the State of Minnesota to aid in the construction of a railroad, hereinbefore described', etc. That the said Great Northern Railway Company is now operating and maintaining a railroad on the right-of-way over public lands granted to the St. Paul, Minneapolis and Manitoba Railway Company under the Act of March 3, 1875."
>
> "That under the Act of March 3, 1875, the St. Paul, Minneapolis and Manitoba Railway Company or its successor, the Great Northern Railway Company, acquired neither the right to use any portion of said right-of-way for the purpose if drilling for and removing subsurface oil and minerals, nor any right, title or interest in or to the oil or mineral deposits underlying the said right-of-way, but that such oil and minerals remained the property of the United States, and subject to its control and disposition."
>
> "That the defendant, the Great Northern Railway Company, claims and asserts ownership to the oils and minerals underlying its right-of-way as aforesaid and the right to take and remove the same and is about to and has threatened to use

portions of the right-of-way, crossing the lands hereinbefore described, for the purpose of drilling for and removing subsurface oil."

"That unless the said Great Northern Railway Company, the defendant, be restrained and enjoined from drilling for and removing oil underlying the surface of the right-of-way hereinbefore described the United States will be deprived of its property and the right thereto and will suffer irreparable injury."

"That any operation or proceeding for, or the taking of any oil, gas, or minerals from the subsurface of the right-of-way hereinbefore described constitutes a violation of the terms and provisions of the said Act of March 3, 1875."

"That no lease has been issued to the defendant, the Great Northern Railway Company under the Act of May 21, 1930 (46 Stat. 373), to drill upon or remove deposits of oil and gas under the said right-of-way of the defendant, nor has any application therefor been made."

"Wherefore, the plaintiff prays that a permanent injunction be issued restraining and enjoining the Great Northern Railway Company from in any manner using the right-of-way granted, as hereinbefore described, for the purpose of drilling for and removing oil, gas and minerals underlying its right-of-way except under a lease issued pursuant to the provisions of the said Act of May 21, 1930, and that a permanent injunction issue, restraining the defendant, the Great Northern Railway Company, from drilling for or removing any oil, gas or minerals beneath the surface of its right-of-way, crossing the lands here-

> inbefore described, *or any other lands granted under the Act of March 3, 1875,* and now owned or used by the said defendant except under a lease issued pursuant to the provisions of the said Act of May 21, 1930."

Only incidentally does the complaint set out that

> "a portion of the said right-of-way, so granted and now in use by the Great Northern Railway Company * * *"

crosses certain described sections of land in Glacier County, Montana. (R. 4, par. IV.) Thus appellant submits that the subject matter of the action is both the Act of March 3, 1875 and the entire right-of-way granted under the Act of March 3, 1875, and not merely an isolated section of land, so that appellant, not owning that particular section, is not barred from setting up its ownership of similar right-of-way in another county, within the territorial jurisdiction of the Court below, and from asking intervention to protect its interest and present an identical question of law and fact.

**New Policy in Intervention Under Rules of Civil Procedure.**

Appellant believes that the new Federal Rules of Civil Procedure largely abandon the policy of the former Rules, at least so far as intervention is concerned.

Rule 24 of the New Rules had its basis in old Equity Rule 37. Setting them out together shows how different they are in form and concept.

Rule 37 was as follows:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claim an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

"Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

Rule 24, so far as pertinent here, reads:

Rule 24. Intervention.

A. Intervention of right. Upon timely application, anyone shall be permitted to intervene in an action. * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by a judgment in the action. * * *

> B. Permissive intervention. Upon timely application, anyone may be permitted to intervene. * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The changes effected by the new rule make inapplicable the authorities based on old Rule 37, in so far as the principles laid down in those cases are inconsistent with the provisions and concept of the new rule.

We respectfully urge that Rule 24 must be construed in the light of the intent of those who drafted it. This intent is expressed by the Circuit Court of Appeals for the Second Circuit in *Collins v. Metro-Goldwyn,* supra. It is also expressed in Pomeroy on Code Remedies (4th Ed.), par. 411, where the author, speaking of Rule 24, says:

> "It discards entirely the ancient notions; it goes far beyond the concessions made by the equity courts; it creates, under the title 'Intervention' or 'Intervening' a new division of the procedure. The fundamental notion is, that the person ultimately and really interested in the result of a litigation—the person who will be entitled to the final benefit of the recovery—may at any time, at any stage, intervene and be made a party, so that the whole possible controversy shall be ended in one action and by a single judgment. The states which have adopted this type to its fullest extent are Iowa and California, and their example has been followed in a number of others."

**Appellant Is Real Party in Interest and Necessary Party to Litigation.**

Now, who is ultimately and really interested in the result of this litigation? Obviously,

1. The Government, claiming ownership of the minerals underlying the entire right-of-way from St. Paul to Tacoma, and claiming, if it obtains a favorable construction of the Act of March 3, 1875, ownership of minerals underlying every other railroad right-of-way obtained under the Act of March 3, 1875, or other Acts in similar and identical language.

2. The Railroad, claiming the fee under the Act.

3. The Intervener, claimant to vast mineral wealth underlying the right-of-way, asserting merely that if the Railroad does not have the fee as has generally been assumed, then certainly the Government has no right to maintain the action, since the Government's right has been transferred by patent to Intervener, appellant herein, and others similarly situated.

We believe these three are essential parties to determination of this question. Only by hearing them all can the Court fairly decide if the Government is entitled to maintain the suit.

To examine again Pomeroy's statement, who "will be entitled to the final benefit of the recovery?" If the Railroad prevails, it will own the minerals; if the Government prevails, it will *claim* to own the minerals and will claim the right to lease the minerals under the Act of May 21, 1930 (46 Stat. 373), converting the

proceeds to its own use. The patentee would be excluded. Certainly the Federal Courts will not, by denying intervention, allow their process to be abused by this palpable attempt to deny a hearing to the grantee of the Government, resulting in the Government's profiting at the expense of its grantee, merely because of the flimsy and technical pretexts contained in the Government's answer set out on page 67, et seq., of the Transcript of Record.

Even if a right existed in appellant to sue the United States in a separate action (which of course does not exist) where, but in this case, is there a more suitable opportunity equitably to achieve the end that "the whole controversy shall be ended in one action and by a single judgment?" Pomeroy, par. 411, supra.

James W. Moore has pointed out that the portion of Equity Rule 37 providing that intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding" has been eliminated in Rule 24, and that the intervener is given the right to litigate the claim or defense for which he intervenes on the merits. He says in this connection:

> "The elimination seems sound, for if the Equity Rule was taken literally the grant of intervention to come in and defend an action, common in patent litigation, would be illusory, since the defendant seriously questions the propriety of the main action. What the phrase was designed to accomplish, it is believed, was to preclude intervenors from attacking the administrative orders already made and from obstructing or delaying

> the progress of the main action." James W. Moore in 25 Georgetown L. Jour. 551, 570.

Appellant pleaded below that its intervention was in subordination to and in recognition of the main proceeding but, taking another view, intervener does "seriously question the propriety of the main action". It will be noted that for that reason no relief is asked against the United States. Intervener's petition merely seeks dismissal of the main action on the ground of plaintiff's lack of interest, as shown by the public records.

In "Federal Intervention: The Right to Intervene and Reorganization", 45 Yale L. Jour. 565, James W. Moore and Edward H. Levi say of Rule 24:

> "Together, the theories of joinder of parties and intervention offer a rational for determining what persons a plaintiff (and sometimes a defendant) may or must bring before a court in a particular action, the effect of a decision therein upon non-parties, and when non-parties may come into a pending litigation to protect interests that are jeopardized thereby or to expedite the hearing of a claim or defense. Intervention counterbalances the many devices of joinder. Its utility lies in offering protection to non-parties, who obviously comprise a large and undefined group with varied interests, oftentimes of tremendous financial and legal importance."

Certainly we do not believe that this Court will deny that a decision in favor of either the plaintiff or defendant below would not jeopardize the appellant's

right to mine the mineral wealth underlying its property. This being so, we submit, that appellant ought to be heard below.

Rule 24 was apparently prepared and enacted with the purpose of adopting the current English practice with respect to interventions, and of abandoning entirely the policy of old Rule 37. In its note to Rule 24 the Advisory Committee says:

> "The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see English Rules Under the Judicature Act (The Annual Practice, 1937) O. 12, r. 24 (admiralty), r. 25 (land), r. 23 (probate); O. 57, r. 12 (execution); J. A. (1925) pp. 181, 182, 183 (2) (divorce); *In re Metropolitan Amalgamated Estates, Ltd.* (1912), 2 Ch. 497 (receivership); *Wilson v. Church,* 9 Ch. D. 552 (1878) (representative action). For the discretionary right see O. 16, r. 11 (non-joinder) and *Re Fowler,* 142 L. T. Jo. 94 (Ch. 1916), *Vavasseur v. Krupp,* 9 Ch. d. 351 (1878) (persons out of the jurisdiction)."
>
> Pocket Supplement, Title 28 U. S. C. A. following 723c, pages 146, 147.

Discussing the modern intervention practice in England, Moore and Levi point out (45 Yale L. Jour. 565, 573) that it may be said to be an outgrowth of admiralty practice *in rem* and the examination *pro interesse suo;* and that although there is no express general rule, intervention is allowed as of right where the petitioner has or claims an interest in the subject

matter of an *in rem* proceeding; in class actions, where the petitioner is inadequately represented, as, for example, a dissentient minority bondholder; in execution proceedings where the petitioner is a claimant of the property levied upon; in divorce proceedings, where intervention is allowed to the King's Proctor, to a co-respondent, and to a qualified extent to any member of the public. The authors conclude: "And by judicial interpretation of the rule on non-joinder the court has discretion in allowing intervention to third parties (citing Re Fowler (1916), 142 L. T. J. 94). In effect it may be said that the absolute and discretionary right would seem to cover the entire field where intervention is warranted.

By adopting this English practice, the language of Rule 37, providing that "anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention" disappeared. The "interest in the litigation" under Rule 37 had to be a legal interest, as that term is judicially defined. Nowhere in new Rule 24 is any such barrier set in the way of an intervention. This would appear to supersede cases similar to *Bickford's, Inc. v. Federal Reserve Bank* (D. C. N. Y. 1933), 5 Fed. Supp. 875, holding the interest must be in the subject matter of the litigation and not an independent right similar to that asserted by a party to the litigation. Also no longer apparently approved, if we are correct, is *Smith v. Gale* (1892), 144 U. S. 509, 36 L. Ed. 521.

In "Intervention in Federal Equity Cases", 17 A. B. A. Jour. 160, 161, Benjamin Wham said:

> "The cases in which the right to intervene is absolute appear to have two characteristics in common: first, the intervener has no other remedy except by intervention and the decree of the Court will be res judicata as to his claim and, second, he has no adequate representation in court. It is thus apparent the dividing line is fixed at a point which will give him an opportunity to be heard either in the main proceeding in person or by representative, or in an individual suit."

Appellant believes that its right under its patents from the United States is superior to any claim asserted by the Government in the Court below, and superior to the claim of the defendant below, Great Northern Railway Company, as to the minerals only. It was held, in *Dutcher v. Haines City Estates* (C. C. A. 5th, 1928), 26 F. (2d) 669, that if intervener's title is alleged to be superior to any claim that may be asserted in the suit and independent thereof, that, even under old Rule 37, intervention should be allowed.

In former years (1911), it has been said that:

> Applications to intervene are of two kinds: In one the applicant has other means of redress open to him, and it is within the court's discretion to refuse to incumber the main case with collateral inquiries; in the other, the applicant's claim of right is such that he can never obtain relief unless it be granted him on intervention in the pending cause, and in such case the right to intervene is absolute.
>
> *United States Trust Co. v. Chicago Terminal Transfer Railway Company,* supra.

Even under Rule 37, as late as 1936, it was said that:

> Generally, intervention is permitted in court's discretion where ends of justice will be served by permitting petitioner to be heard, and as absolute right where petitioner has direct interest in litigation and subject-matter thereof and such intervention is necessary for its protection. United States v. 397 Cases, etc., of Salad Oil (D. C. N. J. 1936), 16 F. Supp. 387.
>
> Discretion to deny leave to intervene is a sound discretion founded on the assumption that there are other available remedies open to the petitioner, and it is error to deny the right in a proper case where he has no other recourse. Richfield Oil Co. v. Western Machinery Co. (C. C. A. 9th, 1922), 279 Fed. 852.

It is of course asserted by appellant, and is a fact, that no other recourse is available to it. But this case is cited for the more important reason that it indicates that on this appeal this Court may consider not only whether appellant is entitled to intervene as of right, but also whether appellant is entitled to consideration under Section B of Rule 24, that is, whether or not the Court below exercised any discretion when it disregarded the point urged by intervener that it had no other remedy. (R. 19, pars. XI, XII.)

> Intervention may be a matter of right where petitioner, not being fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form. Whittaker v. Brictson Mfg. Co. (C. C. A. 8th, 1930), 43 F. (2d) 485.

In an article by Spaeth and Friedberg, 30 Ill. L. Rev. 137, 149, it is stated:

> "It appears from the few decided cases under the new procedure that even when creditors and shareholders must petition for leave to intervene, the tendency is in the direction of freely allowing intervention."

See also

Edmunds Federal Rules of Civil Procedure, Volume 2, Rule 24.

As has been noted, the relief sought by the Government is injunctive. This constitutes all the more reason for permitting intervention. As stated by the Court in *Clymore Production Co. v. Thompson* (D. C. Tex. 1935), 11 F. Supp. 791:

> In a suit to restrain enforcement of a state commission's order restricting complainant's withdrawal or waste of natural gas from an underground pool, adjacent leaseholders who are also taking gas from the pool are held interested in preventing its depletion and may intervene.

There seems to be, to appellant's counsel, a striking parallel between the interests of all adjacent leaseholders interested in an oil and gas field, involved in the case just cited, and all patentees of the United States who own similar and other minerals underlying railroad rights-of-way. Similarly, somewhat parallel is the case of *West v. East Coast Cedar Co.* (C. C. A. 4th, 1900), 101 Fed. 615. There it was held that a part owner of a tract of land who is not made a party to a suit for its partition, but who claims as

a tenant in common with the parties, *and from the same source of title,* may properly be allowed to become a party by intervention, being in fact a necessary party to a decree for its partition. Counsel submit that there is a direct analogy between a suit for partition and the action here involved, which is, in effect, a suit for a partition of the types of fee which may exist in land burdened with a "limited fee" ownership of an easement in the surface in the form of a railroad right-of-way, and separate adjacent and subsurface estates. Further, a partition of the surface from the minerals involves the important question of whether different rules are applicable to the partition of metallic minerals, placer and alluvial deposits, and oil and gas.

Similarly, an injunction case in accord with those cited above is *Coco-Cola Bottling Co. v. Coca-Cola Co.* (D. C. Del. 1920), 269 Fed. 796.

Attention is also called to the parallel case of *United States v. Ladley* (D. C. Idaho, 1931), 51 Fed. (2d) 756, where the State of Idaho was permitted to intervene with claim of title in itself under grant from the United States, in a suit brought by the United States against Ladley to quiet title to land formerly under water.

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### LIBERAL INTERPRETATION OF RULE 24 REQUIRED.

In granting a motion to intervene in a suit brought by the United States against a private corporation, District Judge Galston said that Rule 24, "like all of

the Rules of Civil Procedure, should be liberally interpreted".

*U. S. v. C. M. Lane Life-Boat Co.* (D. C. N. Y., 1938), 25 F. Supp. 410.

Intervention has been permitted under Rule 24 in addition to cases heretofore cited, in *Sloan v. Appalachian Power Co.* (D. C. W. Va., 1939), 27 F. Supp. 108; in *American Surety Co. v. Wheeling Steel Co.* (D. C. W. Va., 1939), 26 F. Supp. 395; in *U. S. v. Certain Lands* (D. C. Ky., 1938), 25 F. Supp. 52.

The case of *United States v. Columbia Gas & Electric Corp.,* a Delaware District Court case (1939), 27 F. Supp. 116, is entitled to be included in what counsel is attempting to present as a fair summary of the applicable law in interventions under Rule 24. The opinion is by Judge Neilds and contains language sharply contrary to the contentions heretofore advanced by appellant. We think that we can explain the language used and the judge's views, in view of the facts in the case, but in fairness to the Court, we mention the case. While the Delaware District Court recognizes that under Rule 24 "the new rule does not specifically set forth the nature of the interest in the property which a person must have in order to establish his claim to intervention as a matter of right," he adds later, "it is improbable that the Supreme Court in promulgating this new rule intended to destroy well established principles as the basis of intervention of right." Granted that the Court did not intend to destroy well-established principles, the wording of the rule is susceptible of no other meaning

than that the Court did intend to broaden the scope of the rule. Further, the Court says:

> "It would produce chaos to require the Courts to recognize the absolute right to intervention of strangers who had no legal or equitable interest in the subject matter of the action."

With this sentence by itself appellant has no quarrel, but refers to the *Metro-Goldwyn* case from the 2nd Circuit Court of Appeals, supra, wherein it is said that under the new rule, the concept of just what is the subject matter of the action is broadened, and that because of the elusive character of a cause of action this concept "has been entirely omitted from the new rules".

Therefore, on the authority of the 2nd Circuit Court of Appeals, counsel can only say that when Judge Neilds dismisses the contention that Rule 24 has broadened these well-established principles with the statement that "this position is without authority to sustain it", he was in error. Otherwise, of course, in denying intervention, the Court was in line with the weight of authority in every respect, because the intervention was not timely, the issues sought to be raised were extraneous ones of a private nature, there was no "res" within the custody of the Court as claimed in the complaint, and there was an attempt to "outrageously enlarge the scope of the litigation", and the prayer was for relief sharply divergent from the scope of the complaint so that intervention would unduly complicate and delay the Government's anti-trust suit. Of course, the rule in any event is that an individual

may not participate in a suit brought by the United States to enforce the anti-trust laws, so that Judge Neild's remarks were largely dicta.

Therefore, it is confidently asserted that appellant's position is not adversely affected by the decision in *U. S. v. Columbia Gas & Electric Corp.,* supra.

**United States Supreme Court Decisions Unanimously and Repeatedly Hold Railway's Estate in Right-of-Way To Be Limited Fee, but Do Not State What That Is.**

Notwithstanding our belief, heretofore expressed, that decisions under Rule 37 must not be considered as controlling in construing New Rule 24, certain legal principles are inherent in intervention, by its very nature.

It is, therefore, proper in this brief to consider whether or not the appellant could ultimately prevail if intervention was granted.

In this connection, Schweppe's Simkins Federal Practise, ¶437, page 372, says:

> "* * * Apparently the well-pleaded averments of the application (for intervention) must be taken as true for the purpose of determining whether a sufficient interest has been alleged for intervention, and cannot be challenged at the hearing by denials, or evidence aliunde; in other words, seemingly, the only contest that can be waged against the application is with respect to its sufficiency upon its face, the merits of applicant's claim being for determination at the trial."

See also

*Atlantic Refining Co. v. Port Lobos Petroleum Corp.* (D. C.), 280 Fed. 934.

For this reason, intervention will be denied where petitioner could not ultimately prevail. (*Washburn Crosby Co. v. Nee,* 13 F. Supp. 751.) Enough of the problem presented by the main case is therefore set out to demonstrate some of the grounds upon which appellant places its belief that it could ultimately prevail below.

So far as defendant and appellee, Great Northern Railway, is concerned, it feels that the right granted it by the Act of March 3, 1875, was a limited fee and that view is sustained by numerous decisions of the United States Supreme Court.

> "What the Act relied upon grants to a railroad company complying with its requirements is spoken of throughout the Act as a 'right-of-way'; and by *way of qualifying future disposals of lands to which such a right has attached,* the act declares that 'all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way'."
>
> "The right-of-way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an *implied condition of reverter* in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee."
>
> *Rio Grande Western R. Co. v. Stringham,* 239 U. S. 44, 47, 60 L. Ed. 136, 36 S. Ct. 5.

> "Following decisions of this court construing grants of right-of-way similar in tenor to the grant now being considered (July 2, 1864) it

must be held that the fee passed by the grant made in Section 2 of the Act of July 2, 1864 * * * subject to conditions expressly stated in the act and to those also necessarily implied such as the road should be * * * used for the purposes designed. * * * The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right-of-way. In effect the grant was a limited fee, *made on an implied condition of reverter* in the event that the company ceased to use or retain the land for the purpose for which it was granted."

*Northern Pacific Railway v. Townsend,* 190 U. S. 267, 47 L. Ed. 1044, 23 S. Ct. 671.

Other decisions to the same effect are:

*United States v. Michigan,* 190 U. S. 379, 398, 47 L. Ed. 1103, 23 S. Ct. 742;

*Northern Pacific Ry. Co. v. Ely,* 197 U. S. 1, 5-6, 49 L. Ed. 639, 25 S. Ct. 302;

*Choctaw, etc., R. R. Co. v. Mackey,* 256 U. S. 531, 65 L. Ed. 1076, 41 S. Ct. 582;

*Noble v. Oklahoma City,* 297 U. S. 481, 80 L. Ed. 816, 56 S. Ct. 562;

*Stalker v. Oregon Short Line,* 225 U. S. 142, 56 L. Ed. 1027, 32 S. Ct. 636;

*Clairmont v. U. S.,* 225 U. S. 551, 56 L. Ed. 1201, 32 S. Ct. 787.

There is an early case of *D. & R. G. Ry. v. Alling,* 99 U. S. 463, 475 (1878), 25 L. Ed. 438, holding that the

railway acquired "a present beneficial easement in the particular way over which the designated route lay".

But that identification of the estate as a limited fee is of no aid in determining what a limited fee is with respect to whether or not the minerals are vested in either the grantor or the grantee—that is, in the United States or the Railroad. In other words the question is not so much what will revert on eventual abandonment, but what was reserved by the grant itself, and what is the present status of the reserved property rights. Most of the Courts say that under the Act of 1875 the railroads took "A fee in the surface and so much beneath as may be necessary for support".

*Western Union Telegraph Co. v. Penn. R. R.,*
195 U. S. 540, 570, 49 L. Ed. 312.

By the use of the word "limited" before the word "fee", it would seem that the Courts had placed some sort of a limitation on the "fee" granted by the Act. Taking the Courts' idea that the railroad has only a "fee in the surface", that would leave title to the minerals and whatever else is reserved by that limitation, vested somewhere. Where? The Government claims that the minerals are vested in it by virtue of some vaguely expressed reservations contained in congressional debates. And the appellant claims that the Government's suit should be dismissed because the Government's interest has been conveyed to the Government's patentees. Certainly there is as much right to be heard in the patentee's claim that the Government has conveyed away its interest as there is in the

Government's claim that minerals did not pass to the railroad by the granting act.

The railroad claims with some merit that its grant under the Act of March 3, 1875, was equivalent to a patent.

In *Great Northern Railway Co. v. Steinke,* 261 U. S. 119, 125, 67 L. Ed. 564, 43 S. Ct. 316, it is said:

> "There is no provision in the act" of March 3, 1875, "for the issue of a patent, but this does not detract from the efficacy of the grant. The approved map is intended to be the equivalent of a patent defining the grant conformably to the intendment of the act. Noble v. Union River Logging R. R. Co., 147 U. S. 165."

In *Chambers v. A. T. & S. F. Ry. Co.,* 255 Pac. 1092 at 1094, 32 N. M. 265, it is said:

> "This grant" of the right-of-way under the Act of July 27, 1866 "had the same effect as a patent; hence the fact that one was not issued to the Atlantic & Pacific Railroad Company by the government is immaterial. 'The approved map', said the court in Great Northern Ry. Co. v. Steinke, 261 U. S. 119, 43 S. Ct. 316, 67 L. Ed. 564, 'is intended to be the equivalent of a patent defining the grant conformably to the intendment of the act.'"

See also

*Seaboard Airline Ry. Co. v. Board,* 108 So. 689, 696, 91 Fla. 612.

> The statute creating the grant was as much a part of the patent as though it had been written therein.
>
> *Lewis v. Rio Grande W. Ry. Co.,* 17 Utah 504, 54 Pac. 981.

Now the statute creating the grant has a section in it, heretofore cited, that says that when the right-of-way becomes fixed, "thereafter all such lands over which such right-of-way shall pass shall be disposed of, subject to such right-of-way". (43 U. S. C. A. 937.)

If the preceding arguments of the Supreme Court are sound, it seems to counsel that the above section of the Act of March 3, 1875, is as much a part of the railroad's "patent" as though it had been written therein; that it accepted the lands over which its right-of-way shall pass subject to such right of disposal.

Where, and how, does this reserve any title in the Government? We believe none exists. The question then arises as to what is the nature of the railroad's interest in the "right-of-way" granted by Congress.

> "The interest granted by the statute * * * is real estate of corporeal quality, and the principles of such apply."
>
> *New Mexico v. U. S. Trust Co.,* 172 U. S. 171, 43 L. Ed. 407, 19 Sup. Ct. 128.

The Court did not say that the entire corpus of the land within the right-of-way was granted to the railway, for it was not. And we believe the case of *Rio Grande Western Ry. Co. v. Stringham,* supra, author-

ity for the proposition that a railroad right-of-way is a separate surface ownership, and a mining title can exist in the same ground.

This was a case involving a railroad right-of-way under the Act of March 3, 1875. The defendants asserted title under a patent for a placer mining claim. Stringham owned the surface by conveyance from the patentee of the claim. The railway company brought an action to quiet title to the strip of land granted to it as a right-of-way. The Supreme Court of Utah held that the defendants' title under the placer patent was subject to the right-of-way and remanded the case to the District Court with directions to enter a judgment awarding to the plaintiff title to a right-of-way over the lands in question. When the case was sent back to the District Court, that Court entered a judgment adjudging the railroad company to be "the owner of a right-of-way" through the mining claim, and declaring the plaintiff's title to the right-of-way good and valid, and enjoining the defendants from asserting any claim whatsoever adverse to the plaintiff's said right-of-way. Plaintiff again appealed, insisting that it was only adjudged to be the owner of a right-of-way, when, according to the true effect of the Act of 1875, it had a title in fee simple. The Supreme Court of the State, however, said that if the railway company thought that the prior decision of the Supreme Court of the State did not correctly define and determine the extent of appellant's rights to the land in dispute, it should have filed a petition for rehearing; that the judgment entered by the District Court was in con-

formity with the decision of the Supreme Court, the latter having become the law of the case. The judgment was affirmed by the State Supreme Court. (38 Utah 113, 110 Pac. 868; 39 Utah 236, 115 Pac. 967.)

The Supreme Court of the United States said that the judgment under review described the railway company's right in the exact terms of the Act, and evidently used those terms with the same meaning they had in the Act, and so, interpreting the judgment, the United States Supreme Court said it accorded to the plaintiff all to which the plaintiff was entitled.

Concerning the right-of-way granted by the Act, the United States Supreme Court said what we have heretofore said on page 40 of this brief.

As we construe the decision, in *Rio Grande Western Ry. Co. v. Stringham,* the patentee of the placer claim and the owner of the surface thereof held the same subject to the right of way of the railroad, that is, the railroad's limited fee in a strip of land 200 feet wide, and extending downward so far as was necessary for right-of-way purposes; in other words, the surface and so much of the subsurface as is necessary for support. Except to this extent the railroad company had no interest in the land embraced in the mining claim. This right was what "attached" to the mining claim. The mining claim would have no right-of-way attached to it if the right-of-way was a separate ownership of the land extending to the center of the earth, and if the patent to the claim conveyed nothing within the right-of-way strip. But appellant also accepts the Government's patent "subject to such right-of-way".

**To Whom Does Limited Fee Revert?**

If such right-of-way is an "easement" 43 U. S. C. A. 940) or limited fee, we have seen that the limited fee is subject to an "implied condition of reverter".

*Rio Grande W. Ry. Co. v. Stringham,* supra, and cases cited in connection therewith.

But what has not ever been settled as a matter of law is the question of reverter. Reverter to whom? For if there are now existing two estates—an estate in the surface and an estate in the minerals, and the estate in the surface will revert to the patentee, will the minerals revert to some other? We think not. We think they are already vested in the patentee. The Act of May 21, 1930, in so far as it attempts to divest mineral rights heretofore granted by patents authorized by Congress is unconstitutional, and would not be urged in support of title in the Government.

As has been said, the better view is not that the minerals will revert with the surface, but that, by the issue of patent, and under the sections of the granting Act above quoted, *they have already vested in appellant.*

We think that these principles, if exhaustively examined, and presented to the trial Court, entitle appellant to assert in good faith that it has an opportunity to ultimately prevail if admitted to the case as intervener, and that it is not thereby burdening the record with any extraneous matter, or delaying the issue between the original parties.

**Montana State Decisions Construing Railroad Right-of-Way Grants Hold Patentee May Remove Minerals.**

After an exhaustive review we can state that in none of the decisions of either the United States Supreme Court or the State Courts, which declare the railway right-of-way obtained by Federal grant to be a limited fee simple estate, is it held that the railway company can remove oil or minerals. Nor are there any cases to the contrary. The question has simply not arisen. Further, there are no cases that say the Government can remove minerals. But, there are State cases in the jurisdiction of the Court below holding that a patentee of land traversed by a right-of-way can remove minerals so long as the railway *use* is not interfered with.

*Northern Pacific v. Forbis* (Montana, 1895), 39 Pac. 571.

This case is authority for the proposition that the railway right-of-way granted under the Act of July 2, 1864, does not take the owner's estate in the minerals or take away the owner's right to work the ground for the minerals if he can do so without interfering with the railway's estate in the easement. We believe that other earlier cases to the same effect, except that they are not under federal grant, are:

*West Covington v. Freking,* 8 Bush. 121;
*Dubuque v. Benson,* 23 Iowa 248;
*Tucker v. Eldred,* 6 R. I. 404;
*Woodruff v. Neal,* 28 Conn. 165;
*Jackson v. Hathaway,* 15 Johns. 447.

See also

*Hollingsworth v. Des Moines Ry. Co.,* 63 Iowa 443, 19 N. W. 325,

and

*Smith v. Hall* (1897), 103 Iowa 95, 72 N. W. 427.

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**PETITION IN INTERVENTION SEEKS NO AFFIRMATIVE RELIEF AGAINST GOVERNMENT—MERELY DISMISSAL OF SUIT.**

For the purpose of technical accuracy, it should be pointed out that technically the Government's complaint does not attempt, except indirectly by operation of a favorable judgment, to try title to land. The complaint states an alleged cause of action for an injunction. It is not an action to quiet title. Hence, the petition in intervention below does not seek to quiet intervener's title by cross-bill against the Government; the petition merely asks that the relief prayed in the defendant's answer be granted—that is, that the complaint be dismissed.

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**GOVERNMENT'S COMPLAINT IS COLLATERAL ATTACK ON ITS PATENTS BARRED BY STATUTE OF LIMITATIONS.**

The United States, by its complaint below is seeking to vacate, annul or avoid the effect of its patent heretofore issued to appellant without giving it a chance to be heard, and, we believe, in attempted contraven-

tion of Section 8 of the Act of March 3, 1891 (26 Stat. 1099) which provides:

> "* * * suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

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## CONCLUSION.

In conclusion, let us consider broadly for a moment what may be very close to the truth we are seeking in connection with the entire problem.

We question whether Congress, between the time of the first railway grant in 1862 and the last, the Act of March 3, 1875, ever thought of the possibility of valuable mineral rights underlying a railroad right-of-way. In more proper legal phraseology, we question whether the idea of a surface severance with a reservation of the subsurface, or the question of mineral rights were thought of or considered by Congress. If the question of limiting the grant to surface rights had been considered, we conjecture it would have been pointed out that the railroad would need at least some subsurface rights for taking embankment materials, excavating cuts and tunnels, sinking wells for water and possibly for subways, and that, therefore, the surface alone would be insufficient. As to minerals, we conjecture it would have been pointed out that in such a long, narrow strip they would have been relatively unimportant, and that it

would be useless to reserve them to the Government unless the Government also reserved the right to enter and carry on mining operations. This would not be considered worth while on such a narrow strip, and would be objectionable because, unless consented to by the railroad, it might interfere with railroad operations. Whatever minerals there might be would ultimately be granted to someone, and, we again conjecture, it would be considered logical to grant them either to the owner of the surface or to the patentee. It is up to the Courts to make this decision after hearing the evidence affecting the question. If any valuable minerals were found, and ownership was in the railroad, they would serve the same purpose as the grants of alternate adjoining sections, and would aid financially in the construction and operation of the railroad. Coal and iron lands were specifically included in the grant of alternate adjacent sections and, presumably, underlying coal and iron would be included in the right of way grant. Petroleum deposits were then unknown in the West. If they had been known or thought of, they would probably have been treated like the coal. Placer gold dredging was then undreamed of. We question whether Congress would have created a severance of the subsurface or made a reservation of minerals under this narrow strip which was granted for railway purposes, any more than it did in granting homestead tracts for farms, but we feel certain that at the time Congress would not have reserved ownership in the United States.

We respectfully submit that intervention should be granted to appellant.

Dated, Wallace, Idaho,
November 3, 1939.

S. P. Wilson,
Edward J. Bloom,
*Attorneys for Appellant,*
*Star Pointer Exploration Company.*

**(Appendix Follows.)**

# Appendix.

## Appendix

### THE SITUATION OF APPELLEE RAYMOND J. MacDONALD.

Pages 30 to 60 of the Transcript of Record deal with certain pleadings filed on behalf of appellee Raymond J. MacDonald. Technically they perhaps have no place in the record, since they were admitted in the case after the order here appealed from was entered by the Court below. (Transcript, bottom of page 29.) They are, however, included because after denying appellant's motion to intervene, the Court below made a "tentative" order that MacDonald's subsequent motion for leave to intervene "be allowed, 'tentatively' and counsel were directed to file brief thereon". (Transcript, page 28, ¶2.)

After argument upon the motion of MacDonald for leave to intervene the Court thus tentatively permitted him to appear in the action and present his contentions, subject, however, to a further consideration of the right of MacDonald to become a party to the action, and subject to a determination of the question as to whether the intervention constitutes a suit against the United States brought without its consent.

This appeal was taken because appellant was at a loss to classify the legal effect of the "tentative" allowance of the intervention, and felt that the record makes it clear that the Court below reserved the right to dismiss the appellee Raymond J. MacDonald from the proceedings below at will. Appellant felt that, should it allow its right of appeal to lapse, and

should the intervener MacDonald eventually be dismissed by the Court below, that the rights to raise the question presented by the petitions in intervention would be irrevocably lost. At the date of this writing appellant has not been advised of any action by the Court below clarifying its position with respect to the permanence of the allowance of the MacDonald intervention.

Even should the Court below finally permit MacDonald to remain in the case, appellant desires to prosecute this appeal for a right to be heard below, because of the very substantial difference in the question of law raised by paragraph XXII of appellee MacDonald's complaint (Transcript, page 46) in intervention and the issue raised by appellant by what are in other respects similar pleadings.

MacDonald does not assert a mineral right in the surface of the right-of-way as does appellant, who claims that such mineral right may be exercised by it with the consent of the railroad. We believe the Government would oppose appellant's claim on the theory that a public trust exists in the right-of-way, and like the other issues set out in the brief, cannot be tried in an independent suit brought for that purpose. We will urge below that gold dredging is not such an operation upon the land within the right-of-way (and outside an agreed distance from the center line of the tracks) as would, if conducted with the permission of the railroad, endanger the railroad or alienate any part of the right-of-way or the railroad's

dominion over the right-of-way so as to interfere with the full exercise of the franchises granted to the railroad by the Acts of Congress. It is therefore contended that the appellant's proposed operation is not in contravention of the rule laid down in Grand Trunk Ry. Co. v. Richardson, 91 U. S. 454, 468, or Northern Pacific v. Townsend, 190 U. S. 267. During and after the dredging, the right-of-way remains intact, and under the jurisdiction of the railroad, and is always available for exclusive railroad use at any moment. The MacDonald complaint, by the insertion of paragraph XXII, dodges effectively this issue.

We hope that the information contained in this appendix is sufficient explanation for appellant's diligent prosecution of this appeal notwithstanding the "tentative" allowance of intervention to MacDonald after denial to appellant.

S. P. Wilson,
Edward J. Bloom,
*Attorneys for Appellant,*
*Star Pointer Exploration Company.*

October 31, 1939.